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JANUARY 30, 2025 BY RONNIE

Crown Appeals Payne: Class Action Under s.2(d), Which Survived Motion To Strike

ORDER IN T-2142-23

THIS COURT'S ORDER is that:

1. This motion is granted in part, and the portion of the Claim related to the Plaintiffs' assertion of the tort of misfeasance in public office is struck.

2. In connection with the Claim's assertion of the tort of misfeasance in public office, the Plaintiffs are granted leave to amend the Claim to identify additional proposed representative plaintiff(s), and to plead material facts in relation to claims by such plaintiffs, who are not afforded grievance rights by the *FPSLRA*.

3. This motion is otherwise dismissed.

4. No costs are awarded on this motion.

"Richard F. Southcott"
Judge

2025 FC 5 (CanLII)

No one should be surprised that a decision from earlier this month is being appealed. This is the ruling from Justice Southcott, which (mostly) dismissed a Motion to Strike. See the earlier piece for more background information.

This is one of the Proposed Class Actions from Umar Sheikh. The main thrust is that unilaterally imposing the "vaccine pass" on workers — even if unionized — amounts to imposing a new term or condition of employment without the opportunity for "meaningful consultation". In short, it does an end run around any sort of collective bargaining agreement. As such, it violates people's Section 2(d) Charter Rights of *freedom of association*.

How this Appeal ends will have significant impact on their other cases, including BCPSEF and FreeToFly. Those are based on substantially the same arguments.

As an aside, counsel for the Qualizza Plaintiff/Appellants has gotten wind of this. That was the clown show of a suit involving 330 current and former military personnel. That Notice of Appeal references the Payne case.

Government Says Case Should Have Been Struck Anyway

In their Notice of Appeal, counsel claims that the case should have been thrown out, as have so many others, under Sections 208 and 236 of the FPSLRA, or Federal Public Sector Labour Relations Act. For reference, s.208 states that all Federal workers have the right to *grieve*, while s.236 denies the right to *sue in Court*.

> 4. The Motion Judge ***erred in law in taking jurisdiction*** over this matter and ***not striking the action*** in accordance with s. 236 of the Federal Public Sector Labour Relations Act

However, the Plaintiffs had successfully convinced Justice Southcott that s.236 didn't completely bar all claims for everyone, despite the case history.

> (a) ***misunderstanding and misapplying Federal Court of Appeal jurisprudence, such as Adelberg v Canada, 2024 FCA 106***, which determined that the Policy on COVID-19 Vaccination for the Core Public Administration Including the Royal Canadian Mounted Police, (COVID-19 policy) was an employment policy related to terms and conditions of employment and emphasized ***that it matters not the way the claim is characterized, whether as a Charter breach or tort***;

The Attorney General references Adelberg, which was: (a) struck for Federal workers; (b) allowed with respect to *travel* claims; and (c) ultimately denied Leave by the Supreme Court. This was Galati's infamous "bad beyond argument" Federal case. But as bad as it was, the FPSLRA didn't completely shut the door on some claims, a point made at the Payne hearing.

One interesting part of the Notice is paragraph 7.

> 7. The Motion Judge erred in finding that the Statement of Claim disclosed a reasonable cause of action in tort for casual workers, students and RCMP members ***as there were no representative plaintiffs for any of these categories, nor had material facts necessary been pled*** and was based on a misapplication of the Federal Court of Appeal decision in McMillan v Canada, 2024 FCA 199.

Justice Southcott struck the malfeasance of public office tort. This was on the basis that it *was* covered by s.236 FPSLRA, and could have been potentially grieved, at least with regard to

the 3 Representative Plaintiffs. The possibility was left open to find new Plaintiffs that it wouldn't apply to.

On that note, the Attorney General argues that there shouldn't be an opportunity to amend, given that none of the current Plaintiffs qualify, and no facts are included. The Court can respond to that in several ways.

The Respondents have served their Notice of Appearance.

Brief Timeline Of Major Events In Case

October 6th, 2023: Statement of Claim is filed on behalf of 3 Representative Plaintiffs.

November 9th, 2023: Government responds with their Notice of Intent.

May 31st, 2024: Government sends notice that it intends to bring Motion to have the case struck (thrown out) in its entirety.

June 6th, 2024: Prothonotary Ring gives directions that there be case management.

June 10th, 2024: Chief Justice Crampton directs (a) Justice Southcott and (b) Prothonotary Ring to be assigned manage the proceeding.

July 1st, 2024: Prothonotary Ring issues schedule for documents to be served for Motion to Strike.

August 19th, 2024: Government brings its Motion to Strike.

October 1st, 2024: Plaintiffs file responding arguments as to why case shouldn't be struck.

December 13th, 2024: Motion to Strike is argued before Justice Southcott.

January 1st, 2025: Justice Southcott *partially* grants the Motion to Strike. The tort of Malfeasance of Public Office is struck, but with Leave if eligible Plaintiffs are identified. The Section 2(d) claims are allowed to proceed.

January 13th, 2025: Government files Notice of Appeal.

January 20th, 2025: Plaintiffs (Respondents) file Notice of Appearance.

Note: All of the dates cited can be confirmed by searching the respective cases on the Federal Court website. It keeps a detailed listing of all significant events.

The Appeal should be heard later this year.

Should s.2(d) be upheld as a way around grievance requirements, this will have enormous influence on injection pass cases, at least at the Federal level. This is why they want Justice Southcott's decision overturned. Of course, the Statutes of Limitation will make it hard to bring any new cases.

PAYNE APPEAL DOCUMENTS:
(1) Payne Notice Of Appeal January 2025
(2) Payne Notice Of Appearance January 2025

PAYNE FEDERAL COURT DOCUMENTS:
(1) Payne Statement Of Claim October 2023
(2) Payne Notice Of Intent To Defend November 2023
(3) Payne Letter Intent To Strike May 2024
(4) Payne Defendant Motion Record To Strike August 2024
(5) Payne Plaintiff Responding Motion Record October 2024
(6) https://www.canlii.org/en/ca/fct/doc/2025/2025fc5/2025fc5.pdf
(7) https://www.canlii.org/en/ca/fct/doc/2025/2025fc5/2025fc5.html

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